Supreme Court, U.S.
FILED

No. 011578 APR 22 2002

OFFICE OF THE CLERK

In The

Supreme Court of the United States

MEDICAL ASSURANCE OF WEST VIRGINIA, INC.,
Petitioner,

v.

EVANGELINE C. PIZARRO, M.D.; COLUMBO AND STUHR, P.L.L.C.,
Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTION PRESENTED

May the courts of West Virginia, on public policy grounds, refuse to enforce an arbitration clause that is otherwise enforceable under the Federal Arbitration Act?

LIST OF PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE

Medical Assurance of West Virginia, Inc. ("Medical Assurance") - Petitioner (Defendant/Appellant)

> Medical Assurance of West Virginia, Inc. is a West Virginia stock insurance corporation. Medical Assurance, Inc., a Delaware holding corporation, owns 100% of the stock of Medical Assurance of West Virginia, Inc. ProAssurance Corporation, a Delaware holding corporation that is publicly traded on the New York Stock Exchange, owns 100% of the stock of Medical Assurance, Inc.

Evangeline C. Pizarro, M.D. ("Dr. Pizarro") - Respondent (Plaintiff/Appellee)

Colombo & Stuhr, PLLC ("Colombo & Stuhr") - Respondent (Defendant/Appellee)

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The Order refusing Medical Assurance's Petition for Writ of Prohibition, which was entered by the West Virginia Supreme Court of Appeals on January 23, 2002, is reprinted in the Appendix at page App. 1.

The Order denying Medical Assurance's Motion to Dismiss for lack of subject matter jurisdiction, which was entered by the Circuit Court of Ohio County, West Virginia on August 17, 2001, is reprinted in the Appendix beginning at page App. 3.

BASIS FOR JURISDICTION

The West Virginia Supreme Court of Appeals's Order denying Medical Assurance's Petition for Writ of Prohibition was entered on January 23, 2002. (App. 1) This Court has jurisdiction pursuant to *28 U.S.C. §1257(a).*

STATUTE INVOLVED IN THE CASE

Section 2 of the Federal Arbitration Act ("FAA") provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

STATEMENT OF THE CASE

West Virginia courts have refused to enforce a valid arbitration clause contained in Dr. Pizarro's medical professional liability policy issued by Medical Assurance (the "Policy"). The Policy requires that any claim by the insured against the insurer be resolved in accordance with the arbitration provisions of the Policy. This requirement is set forth in Section V, in which the parties agreed that "Any claim against us [Medical Assurance] shall be settled by arbitration as provided in Section XIII below."

Section XIII contains the parties' acknowledgment that the agreement "evidences a transaction involving interstate commerce" and that any dispute arising from or connected to the Policy shall be submitted to binding arbitration. Specifically, Section XIII, entitled Arbitration states, in pertinent part:

> Both the insured and we acknowledge that this agreement evidences a transaction involving interstate commerce. Any dispute, claim or controversy arising out of, relating to or in connection with the policy, its subject matter or its negotiation, as to the existence, validity, interpretation, performance, non-performance, enforcement, operation, breach of contract, breach of warranty, continuance or termination thereof or any claim alleging fraud, deceit, or suppression of any material fact or breach of fiduciary duty shall be submitted to binding arbitration in accordance with Title 9 U.S.C. § 1, et seq. . . .The provisions hereof shall be a complete defense to any suit, action, or proceeding inany federal, state or local court or before any administrative tribunal with respect to any dispute, claim or controversy arising under the policy.

Dr. Pizarro and Medical Assurance also agreed in Section XIV of the Policy that the arbitration provisions of the Policy are governed by the FAA. Section XIV states:

> The policy shall be construed, and the legal relations between us and the insureds (and anyone claiming under the insureds) shall be determined, in accordance with the laws of the state in which the address of the policyholder, as specified in the Coverage Summary, is located, except that the Federal Arbitration Act (Title 9 of the United States Code) shall apply to the rights and obligations of the parties to submit any dispute, claim or controversy arising under the policy to arbitration, as provided in Section XIII above.

The Policy was issued in 1998 and obligates Medical Assurance to provide a defense to and indemnify Dr. Pizarro for medical malpractice claims made against her prior to the retroactive date identified in the Policy, provided such claims are reported to Medical Assurance during the policy period. The Policy sets limits of $1,000,000 per claim and was issued to Dr. Pizarro at her Wheeling, West Virginia, office address. While her primary office is located in West Virginia, Dr. Pizarro also provided medical services to patients at the Bellaire Medical Center in Belmont County, Ohio, two days a week, and the Policy covered claims made against her arising from treatment in both states.

Deloris and Ralph Young sued Dr. Pizarro for medical malpractice in Belmont County, Ohio in December 1998. This action will be referenced as the "Medical Lawsuit." The Youngs alleged that Dr. Pizarro and other healthcare providers negligently treated Deloris Young at the Bellaire Health Center in Bellaire, Ohio. Medical Assurance retained Columbo & Stuhr to defend Dr. Pizarro in the Medical Lawsuit.

The Medical Lawsuit proceeded to trial and resulted in a jury verdict against Dr. Pizarro for compensatory damages of $7.5 million. The Medical Lawsuit is currently pending and has not been resolved on appeal.

Dr. Pizarro filed suit against Medical Assurance in the Circuit Court of Ohio County, West Virginia, on September 9, 2000, approximately two weeks after the jury verdict in the Medical Lawsuit. In the suit (the "Bad Faith Lawsuit"), Dr. Pizarro alleged that she sustained damages because Medical Assurance failed to settle the Medical Lawsuit within policy limits and that this failure violated Medical Assurance's duty to deal in good faith under the Policy. Dr. Pizarro also claimed that Medical Assurance's actions violated provisions of West Virginia's Unfair Trade Practices Act ("UTPA"), *W.Va. Code § 33-11-1, et seq.* Dr. Pizarro later asserted claims against Columbo & Stuhr in the same action.

Medical Assurance filed a Motion to Dismiss the Bad Faith Lawsuit. A copy of the Motion to Dismiss is contained in the Appendix at pages App. 6-8. In its Motion, Medical Assurance advised the court that the arbitration provisions contained in the policy were enforceable under the FAA and thus required arbitration of the dispute. In support of its Motion, Medical Assurance submitted a Memorandum of Law which demonstrated that the FAA was applicable because the policy of insurance evidenced a transaction involving interstate commerce and contained a written agreement to settle disputes arising from the contract by arbitration. The Memorandum of Law further demonstrated that all of Dr. Pizarro's claims arose from, related to and are in connection with the Policy and that, under the FAA, the arbitration provision must be enforced and any contrary state law or policy was preempted. Medical Assurance asked the circuit court to dismiss the action based on the applicability of the arbitration provisions and the court's resulting lack of subject matter jurisdiction.

The circuit court denied Medical Assurance's Motion to Dismiss in an Order dated August 17, 2001. (App. 3-5) While the circuit court failed to mention the FAA

specifically in its Order, the circuit court impliedly recognized the applicability of FAA by acknowledging the presence of the arbitration provision in the Policy and constructing its ruling in such a way as to avoid yielding to the mandates of the FAA. Instead of dismissing Dr. Pizarro's claims as required by the FAA, the circuit court wrote that it is against public policy for an insurer to include an arbitration provision in its insurance policies. (App. 5) The circuit court also found that the arbitration provision did not govern the Bad Faith Lawsuit. In reaching these conclusions, the circuit court conceded that the scope of the arbitration provision was quite broad. (App. 4) The court also acknowledged that Dr. Pizarro's claims "would not exist but for the insurance policy." (App. 4) If the circuit court was correct that the arbitration provision did not govern Dr. Pizarro's claims, it would be unnecessary for the circuit court to also find that the arbitration provision violated public policy. The inconsistent positions taken by the circuit court indicate an attempt to dispose of Medical Assurance's Motion to Dismiss without directly implicating the FAA because the circuit court recognized that if the FAA was implicated, the circuit court would lose subject matter jurisdiction over Dr. Pizarro's claims and would be required to grant Medical Assurance's Motion to Dismiss.

In response to the circuit court's order, Medical Assurance filed a Petition for Writ of Prohibition in the West Virginia Supreme Court of Appeals.[1] (App. 9-18) Medical Assurance asserted that the circuit court abused its authority and exceeded its legitimate powers when it retained jurisdiction over the Bad Faith Lawsuit. Medical Assurance argued that circuit court's Order was improper because:

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[1] In West Virginia, a Petition for Writ of Prohibition falls within the West Virginia Supreme Court of Appeals' original jurisdiction. *See, W.Va. Code* §53-1-1 (2000 Replacement Vol.); *West Virginia Rules of Appellate Procedure* Rule 14(a). The West Virginia Supreme Court of Appeals has discretion reject a Petition for Writ of Prohibition by determining not to grant a rule to show cause. *West Virginia Rules of Appellate Procedure* Rule 14(b).

1. The ruling permitted a civil action to proceed in the absence of subject matter jurisdiction;

2. The court refused to enforce a valid arbitration provision; and

3. The ruling ignored the applicability of the FAA, which requires the enforcement of arbitration agreements contained in contracts involving interstate commerce, as the contract between Dr. Pizarro and Medical Assurance did.

(App. 10-11)

The West Virginia Supreme Court of Appeals refused Medical Assurance's Petition for Writ of Prohibition without discussion by order dated January 23, 2002. (App. 1). This Petition was filed within 90 days of the entry of the order, in accordance with Supreme Court Rule 13.

ARGUMENT

THE WEST VIRGINIA COURTS ERRED BY REFUSING, BASED ON PUBLIC POLICY, TO ENFORCE A VALID WRITTEN ARBITRATION AGREEMENT THAT IS OTHERWISE ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT.

Dr. Pizarro's Policy contains a valid and enforceable arbitration clause. The Policy meets the two requirements established by this Court for preemption of state law and enforcement under the FAA. The Policy contains a written agreement between the parties to arbitrate contractual disputes, and the contract reflects a transaction involving interstate commerce. *American Home Assurance Co. v. Vecco Concrete Constr. Co., Inc.*, 629 F.2d 961, 963 (4th Cir. 1980) (citing *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 76 S.Ct. 273

(1956) for prerequisites for application of FAA); *see also, Southland Corp. v. Keating*, 465 U.S. 1, 11, 104 S.Ct. 852, 858, 79 L.Ed.2d 1 (1984).

The written arbitration agreement is set forth in full in Section XIII of the Policy, and is also referenced in Sections V and XIV. There is no dispute that the Section XIII of the Policy contains a broadly worded contract to arbitrate that encompasses:

> [a]ny dispute, claim or controversy arising out of, relating to or in connection with the policy, its subject matter or its negotiation, as to the existence, validity, interpretation, performance, non-performance, enforcement, operation, breach of contract, breach of warranty, continuance or termination thereof...

Where a contract, including a contract of insurance, contains an arbitration clause, the arbitration clause is not limited to a literal interpretation of the terms of the contract, but extends to all claims having a significant relationship to the contract. *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88 (4th Cir. 1996); *Montauk Oil Transp. Corp. v. Steamship Mut. Underwriting Ass'n (Bermuda) Ltd.*, 79 F.3d 295 (2nd Cir. 1996) (enforcing compulsory arbitration provision in policy of insurance); *Heinhaus v. Venute Assoc., Inc.*, 959 F.2d 551, 553-54 (5th Cir. 1992) (holding that parties to an excess insurance policy, which incorporated by reference the underlying insurance policy, were bound by the arbitration clause contained in the underlying policy). Claims for breach of fiduciary duty are proper subjects of arbitration where the contract contains a clause requiring arbitration of any dispute arising under the contract. *Mediterranean Enter., Inc. v. Ssangyong Corp.*, 708 F.2d 1458 (9th Cir. 1983). Federal law does not limit arbitrable disputes to those specifically set forth in the contract, but extends to claims relating to the validity of the contract, statutory claims, and common law claims. *See, Peoples Security Life*

Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809 (4th Cir. 1989); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997).

As the trial court below correctly noted, none of Dr. Pizarro's claims would exist but for the Policy. (App. 4). Her claim for alleged breach of the implied covenant of good faith and fair dealing arising from the Policy cannot be separated from the Policy. *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W.Va. 585, 396 S.E.2d 766 (1990); *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W.Va. 430, 435, 504 S.E.2d 893, 898 (1998). Similarly, her UTPA claims turn on Medical Assurance's performance under the Policy and cannot be separated from it. Therefore, Dr. Pizarro's claims must be arbitrated in accordance with the Policy.

The Policy also meets the FAA's requirement that the contract must involve interstate commerce if arbitration is to be compelled. This is evident from the facts of the case. The Policy was issued in West Virginia and provided coverage to Dr. Pizarro whether she was treating patients in West Virginia or Ohio. Dr. Pizarro's claims arise from Medical Assurance's handling of a claim asserted against her in Ohio, based on medical treatment rendered at a facility in Ohio. The Medical Lawsuit is being litigated in Ohio, and if a judgment or settlement is paid in the Medical Lawsuit, the payment will be made to an Ohio resident. Because Dr. Pizarro regularly practices medicine in Ohio, the funds used to pay her insurance premiums were undoubtedly derived at least in part by the provision of services to out of state residents. Where services are regularly performed for out-of-state patients and revenue is generated from out-of-state sources, a matter is deemed to affect interstate commerce. *See Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 329-330, 111 S.Ct. 1842, 1847, 114 L.Ed.2d 366 (1991).

Additionally, the parties to the contract agreed that the Policy involved interstate commerce. The Policy states that "Both the insured and we acknowledge that this agreement evidences a contract involving interstate commerce."

When the requirements of a written contract to arbitrate and the involvement of interstate commerce are met, the FAA governs, and any contrary state law or policy

is preempted. *Southland*, 465 U.S. at 15-16, 104 S.Ct. at 860-861; *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 272, 115 S.Ct. 834, 838, 130 L.Ed.2d 753 (1995).

In this instance, the West Virginia courts are required to "vigorously enforce" the arbitration agreement between Dr. Pizarro and Medical Assurance in order to carry out the underlying policies of the FAA. *Peoples Security Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 813 (4th Cir. 1989) (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238, 1242, 84 L.Ed.2d 158 (1985)). The West Virginia courts have refused to do so, based on public policy. (App. 1, 3-5) Their refusal is in direct violation of the holding in *Allied-Bruce Terminix*, in which this Court wrote:

> We must decide in this case whether that Act [the FAA] used language about interstate commerce that nonetheless limits the Act's application, thereby carving out an important statutory niche in which a State remains free to apply its antiarbitration law **or policy**. We conclude that it does not.

Allied-Bruce Terminix Co., 513 U.S. at 273 (emphasis added). It also contradicts this Court's declaration that agreements governed by the FAA are enforceable in both federal and state courts. *Southland*, 465 U.S. at 14-15.

The West Virginia courts improperly invoked a previously unarticulated state public policy against arbitration provisions in insurance policies to void the arbitration agreement in the Policy. The West Virginia courts exceeded their legitimate authority and the scope of their jurisdiction when they ignored the FAA and other relevant federal law to reach their improper holding. The FAA requires enforcement of the arbitration provisions in the Policy. As this Court has announced unequivocally, "The basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix Co.*, 513 U.S. at 270. Neither the FAA nor the case law interpreting it makes an exception

based on a state's public policy. *Id.* at 273. The orders of the West Virginia courts in this case undercut the very purpose of the FAA, which is "to reverse the longstanding judicial hostility to arbitration agreements ... and to place arbitration agreements upon the same footing as other contracts." *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 89 (2000) (*quoting Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). Accordingly, those orders are due to be reversed.

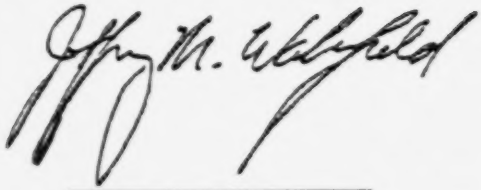
CONCLUSION

The West Virginia courts improperly refused to enforce a valid arbitration clause in the instant case based on public policy grounds. In doing so, they ignored this Court's holdings favoring a broad interpretation and application of the FAA. This Court has explicitly noted that state courts cannot refuse to enforce a valid arbitration clause based on public policy grounds, as the West Virginia courts have done. West Virginia's judicial hostility towards arbitration agreements should enjoy no deference in this Court. A state should not be permitted to disregard the FAA under either the guise of public policy or a distorted view of the contract in question.

The West Virginia courts have decided an important federal question in a way that conflicts with both federal law and decisions of this Court. For this reason and the others stated above, Medical Assurance respectfully requests that this Court accept review of this matter.

WHEREFORE, the Petitioner respectfully requests that a Writ of Certiorari be issued to the West Virginia Supreme Court of Appeals for the purpose of bringing before this Court for full briefing and review the West Virginia courts' decisions retaining jurisdiction and refusing to compel arbitration in this matter.

Respectfully submitted,
By Counsel



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STATE OF WEST VIRGINIA

No. 012571

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 23rd of January, 2002, the following order was made and entered:

State of West Virginia ex rel. Medical Assurance of West Virginia, Inc.,

Petitioner,

vs.)

Honorable Martin J. Gaughan, Judge of the Circuit Court of Ohio County, Evangeline C. Pizarro, M.D., and Colombo & Stuhr, PLLC,

Respondents.

On a former day, to-wit, December 17, 2001, came the petitioner, Medical Assurance of West Virginia, Inc., by Flaherty, Sensabaugh & Bonasso, Jeffrey M. Wakefield and Michelle Marinacci, its attorneys, and presented to the Court its petition and memorandum of law in support thereof, praying for a writ of prohibition to be directed against the respondents, the Honorable Martin J. Gaughan, Judge of the Circuit Court of Ohio County, Evangeline C. Pizarro, M.D., and Colombo & Stuhr, PLLC, as therein set forth. Thereafter, on the 11th day of January, 2002, came the respondent, Evangeline C. Pizarro, M.D., by Cassidy, Myers, Cogan, Voegelin & Tennant, Patrick S. Cassidy and Wray V. Voegelin, her attorneys, and presented to the Court her written response in opposition thereto.

Upon consideration whereof, the Court is of opinion that a rule should not be awarded and the writ prayed for by the petitioner is hereby refused.

A True Copy

Attest: /s/_____

Clerk, Supreme Court of Appeals

IN THE CIRCUIT COURT OF OHIO COUNTY,
WEST VIRGINIA

2001 AUG 17 AM 8 52
CIVIL ACTION NO. 00-C-1498

EVANGELINE C. PIZARRO, M.D.
Plaintiff,

vs.

MEDICAL ASSURANCE OF WEST VIRGINIA, INC. and
COLOMBO AND STUHR, PLLC,
Defendants.

Entered August 16, 2001

ORDER

Now before this Court is the Motion to Dismiss of Defendant Medical Assurance of West Virginia, Inc. ("Medical Assurance"). Specifically, Medical Assurance asserts that this Court lacks subject matter jurisdiction over this action due to the existence of an arbitration provision contained in the medical professional liability policy ("insurance policy") which it issued to Plaintiff Evangeline C. Pizarro, M.D. ("Dr. Pizarro").

The Court has considered Medical Assurance's motion, the memorandum of law submitted by both parties, the parties' oral arguments, and other pertinent legal authorities. For the following reasons, the Court finds that the arbitration provision contained in the insurance policy does not govern the instant action, and therefore, Dr. Pizarro may litigate her claims against Medical Assurance in this Court.

Findings:

The arbitration provision in question provides that disputes "arising out of, relating to or in connection with the policy, its subject matter or its negotiation . . . shall be submitted to binding arbitration." This Court recognizes that the term "arising out of" coupled with "relating to or in connection with" in an arbitration provision has the effect of broadening the scope of that provision. See, e.g., American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88 (4th Cir. 1996). Nonetheless, issues raised by a party subject to such a provision must still fall squarely within the reach of the parties' underlying contractual agreement in order for the arbitration provision to control. See, e.g., Midwest Mechanical Contractors, Inc. v. Commonwealth Constr. Co., 801 F.2d 748 (5th Cir. 1986).

The Court finds that Dr. Pizarro's common law and statutory bad faith tort claims are simply not within the reach of the insurance policy. To fall within its reach, Dr. Pizarro's claims would, at minimum, have to raise a question, the resolution of which would require reference to or interpretation of some portion of the insurance policy itself with regard to the rights of the parties under the policy. Here, Dr. Pizarro is alleging that Medical Assurance breached duties imposed on it by law to deal fairly and in good faith in settling any claims filed against her in connection with her medical practice. Dr. Pizarro is not alleging that Medical Assurance failed to perform any obligations owed to her under the language of the insurance policy.

This Court also finds that, notwithstanding the fact that Dr. Pizarro's claims would not exist but for the insurance policy, this fact alone is not enough to characterize the instant dispute as "arising out of, relating to or in connection with" the insurance policy.

In reaching the foregoing conclusions, this Court adopts the views already expressed on these matters by

several jurisdictions. See, Armada Coal Export, Inc. v. Interbulk, Ltd., 726 F.2d 1566 (11th Cir. 1984); Hersman, Inc. v. Fleming Companies, Inc., 19 F.Supp.2d 1282 (M.D. Ala. 1998), aff'd, 180 F.3d 271 (11th Cir. 1999); Dusold v. Porta-John Corp., 807 P.2d 526 (Ariz. Ct. App. 1990); Terminix Int'l Co., L.P. v. Michaels, 668 So.2d 1013 (Fla. Dist. Ct. App. 1996).

This Court further finds that it is against public policy for an insurance company to insert an arbitration provision into its policies, the effect of which eradicates an individual's statutorily-created rights. In West Virginia, an insured has a private cause of action against her insurer for breach of its general legal duty to deal fairly and in good faith in settling claims against her. See W.Va. Code § 33-11-4(9) (2000). This Court believes that Dr. Pizarro's statutory right to sue Medical Assurance for breach of its legal duty would effectively be defeated if the arbitration provision controlled this dispute. Cf. Wheeling-Pittsburgh Steel Corp. v. Rowing, 517 S.E.2d 763 (W.Va. 1999); Copley v. NCR Corp., 394 S.E.2d 751 (W.Va. 1990).

Accordingly, it is hereby **ORDERED** that Defendant Medical Assurance's Motion to Dismiss for lack of subject matter jurisdiction is DENIED.

It is further **ORDERED** that the Circuit Clerk shall forward attested copies of the Order to all parties of record.

ENTER the 16th day of August, 2001.

/s/
MARTIN J. GAUGHAN, JUDGE
First Judicial Circuit

A copy, Teste
/s/
Circuit Clerk

IN THE CIRCUIT COURT OF OHIO COUNTY,
WEST VIRGINIA

CIVIL ACTION NO. 00-C-1489(G)
(Judge Gaughan)

EVANGELINE C. PIZARRO, M.D.,
Plaintiff,

VS.

MEDICAL ASSURANCE OF WEST VIRGINIA, INC., WILLIAM A. DAVIS, ESQ. and COLOMBO AND STUHR, P.L.L.C.,
Defendants.

MOTION TO DISMISS OF MEDICAL ASSURANCE OF WEST VIRGINIA, INC.

COMES NOW the defendant, Medical Assurance of West Virginia, Inc. ["Medical Assurance"], by counsel, and moves the Court, pursuant to the provisions of Rules 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure, for the entry of an order dismissing the above-captioned civil action as to Medical Assurance on the ground that this Court lacks jurisdiction of the subject matter of this action and the Amended Complaint fails to state a claim upon which relief may be granted.

In further support of said motion, Medical Assurance states:

1. On or about September 19, 2000, the plaintiff, Evangeline C. Pizarro, M.D. ["Dr. Pizarro"], filed her Complaint. Dr. Pizarro asserted claims against Medical Assurance in Counts I, II, III and IV. Counts I, II and III contain claims emanating from the decision of the West Virginia Supreme Court of Appeals in Shamblin v. Nationwide Mut. Ins. Co., 183 W.Va. 585, 396 S.E.2d 766

(1990). Count IV asserts a claim under the West Virginia Unfair Trade Practices Act ["UTPA"], W.Va. Code §§ 33-11-1, et seq.[1]

2. Dr. Pizarro subsequently filed and served an Amended Complaint. The allegations against Medical Assurance do not differ from the original Complaint.

3. Dr. Pizarro's action has as its gensis an underlying medical professional liability suit pending in the Court of Common Pleas of Belmont County, Ohio in which Dr. Pizarro is a named defendant. The underlying medical professional liability action proceeded to trial on August 22, 2000 and a jury verdict was returned against Dr. Pizarro and another defendant on August 25, 2000 in the total amount of $7.5 million. See Amended Complaint, ¶ 14. Following the verdict, the plaintiffs in the underlying medical professional liability action have filed a motion for prejudgment interest. Id., ¶ 15. Additionally, post-verdict motions have been filed on behalf of Dr. Pizarro which remain unresolved.

4. Medical Assurance asserts that the Amended Complaint fails to state a cause of action upon which relief may be granted relative to Counts I, II and III in that there is not a final, non-appealable judgment of record in the Court of Common Pleas of Belmont County, Ohio which would result in their being any personal exposure to Dr. Pizarro. The underlying medical professional liability action has not been resolved and is currently the subject of various post-verdict motions. Unless and until the underlying medical professional liability action is resolved in a manner which results in a final and non-appealable judgment against Dr. Pizarro for an amount in excess of the available medical professional liability coverage, the claims asserted in Counts I, II and III are premature in that Dr. Pizarro does not face any personal exposure at this time.

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[1] Count V in the original Complaint states a legal malpractice claim against William A. Davis.

5. Count IV of the Amended Complaint fails to state a cause of action upon which relief may be granted in that the facts alleged do not fall within any provisions of the UTPA and none are cited in the Amended Complaint.

6. Additionally, this Court lacks subject matter jurisdiction over the Amended Complaint filed against Medical Assurance because any dispute between Dr. Pizarro and Medical Assurance is subject to binding arbitration in accordance with Title 9 U.S.C. § 1, et seq. (the United States Arbitration Act) and the Commercial Arbitration Rules of the American Arbitration Association. Specifically, ¶ XIII of the General Conditions of the medical professional liability policy issued to Dr. Pizarro, being Policy No. MP26607, contains a valid and enforceable arbitration clause.

WHEREFORE, for the reasons stated above, Medical Assurance of West Virginia, Inc. prays that its motion be granted together with such other and further relief as the Court may deem proper.

MEDICAL ASSURANCE OF WEST VIRGINIA, INC.,
By Counsel,

/s/

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IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

No. 012571
Upon original jurisdiction in prohibition,

STATE OF WEST VIRGINIA, EX REL. MEDICAL ASSURANCE OF WEST VIRGINIA, INC.,
Petitioner,

v.

THE HONORABLE MARTIN J GAUGHAN, JUDGE OF THE CIRCUIT COURT OF OHIO COUNTY; EVANGELINE C. PIZARRO, M.D.; and COLOMBO & STUHR, PLLC,
Respondents.

PETITION FOR WRIT OF PROHIBITION

COMES NOW the Petitioner, Medical Assurance of West Virginia, Inc. ["Medical Assurance"], by counsel, and petitions this Honorable Court to award a Writ of Prohibition against the respondents, the Honorable Martin J. Gaughan ["Judge Gaughan"], in his official capacity as Judge of the Circuit Court of Ohio County, West Virginia, Evangeline C. Pizarro, M.D. ("Dr. Pizarro") and Colombo & Stuhr, PLLC ["Colombo & Stuhr"].

STATEMENT OF JURISDICTION

1. This Petition for Writ of Prohibition is filed pursuant to Article 8, Section 3 of the Constitution of West Virginia, granting the Supreme Court of Appeals original jurisdiction in prohibition, and pursuant to West Virginia Code § 53-1-1 (2000 Replacement Vol.). This Petition is also filed under the provisions of Rule 14(a) of the West Virginia Rules of Appellate Procedures.

2. Pursuant to the original jurisdiction of this Court, Medical Assurance seeks relief in the form of a Writ of Prohibition on the basis that Judge Gaughan exceeded his legitimate power by entering an Order on August 17, 2001 denying Medical Assurance's Motion to Dismiss Plaintiff's Complaint for lack of subject matter jurisdiction. See Exhibit "A."

3. "[P]rohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W.Va. Code § 53-1-1 (2000 Replacement Vol.); Syl. Pt. 4, State ex rel. Jeanette H. v. Pancake, 207 W.Va. 154, 529 S.E.2d 865 (2000); Syl. Pt. 1, State ex rel. Means v. King, 205 W.Va. 708, 520 S.E.2d 875 (1999).

4. A Writ of Prohibition will lie where the abuse of power is so flagrant and violative of a Petitioner's rights so as to make the remedy of appeal inadequate. State ex rel. UMWA International Union v. Maynard, 176 W.Va. 131, 342 S.E.2d 96 (1985).

5. Prohibition is an appropriate remedy in instances where, as here, a trial court permits a civil action to proceed in the face of an arbitration provision in a contract between the parties. See State ex rel Center Designs, Inc. v. Henning, 201 W.Va. 42, 491 S.E.2d 42 (1997); Baker Mine Service, Inc. v. Nutter, 171 W.Va. 770, 301 S.E.2d 860 (1983); State ex rel Ranger Fuel Corp. v. Lilly, 165 W.Va. 98, 267 S.E.2d 435 (1980).

6. Medical Assurance asserts that Judge Gaughan's ruling in the August 17, 2001 Order constitutes an abuse of authority and exceeds the court's legitimate powers for the following reasons:

(a) the ruling permits a civil action to proceed notwithstanding the absence of subject matter jurisdiction in the Circuit Court of Ohio County, West Virginia;

(b) the ruling declines to enforce a valid and enforceable arbitration provision existing in a contract of insurance between Medical Assurance and Dr. Pizarro;

(c) the ruling runs afoul of the provisions of federal law, specifically the provisions of the Federal Arbitration Act, 9 U.S.C. § 1, et seq. ["FAA"], which preempt state law and require enforcement of arbitration agreements contained in contracts involving interstate commerce.

7. A Writ of Prohibition is appropriate and the only available remedy for Medical Assurance in this case for the following reasons, to-wit:

(a) the error committed by the Circuit Court is substantial, clear-cut and plainly in violation of federal law which preempts state law;

(b) the error committed by the Circuit Court may be resolved independently of any disputed facts;

(c) appeal is not an adequate remedy because the error will not be corrected until after the litigants, lawyers and the court have expended substantial effort and resources in handling a matter over which the Circuit Court has no subject matter jurisdiction;

(d) there is a high probability that the Circuit Court will be reversed.

PARTIES

8. Medical Assurance is a West Virginia corporation authorized to do business and to issue medical professional liability insurance policies in West Virginia. Medical Assurance issued a medical professional liability policy, being policy number MP26607, to Dr. Pizarro which provided coverage to Dr. Pizarro for claims asserted by Deloris and Ralph Young in the Court of Common Pleas of Belmont County, Ohio. Medical Assurance is currently a defendant in a civil action pending in the Circuit Court of Ohio County, West Virginia, being Civil Action No. 00-C-

1489(G), which was filed by Dr. Pizarro and which arises from Medical Assurance's handling of the Youngs' claims against Dr. Pizarro.

9. Judge Gaughan is a duly elected Circuit Court Judge in the First Judicial Circuit, and is the presiding Judge in Civil Action No. 00-C-1489(G).

10. Dr. Pizarro is a Medical Assurance insured and the named plaintiff in the civil action pending in the Circuit Court of Ohio County, West Virginia, being Civil Action No. 00-C-1489(G).

11. Colombo & Stuhr, PLLC ["Colombo & Stuhr"] is a professional limited liability company existing under the laws of the State of West Virginia engaged in the practice of law. It is a named defendant in Civil Action No. 00-C-1489(G) which arises from Colombo & Stuhr's representation of Dr. Pizarro relative to the Youngs' claims against Dr. Pizarro.

FACTUAL BACKGROUND

12. On or about January 7, 1998, Medical Assurance issued a medical professional liability policy ["the policy"], being policy number MP26607, to Pizarro & Pizarro, M.D.'s, 2115 Chapline Street, Suite 201, Wheeling, West Virginia 26003. Dr. Pizarro is a named insured under the policy. See Exhibit "B."

13. The policy has a retroactive coverage date to July 1, 1992 and obligates Medical Assurance to provide a defense to and indemnify Dr. Pizarro (up to the policy limits of $1,000,000 per claim) for medical professional liability claims.

14. The policy additionally contains the following provisions relative to disputes arising between Dr. Pizarro and Medical Assurance:

GENERAL CONDITIONS

V. CLAIMS AGAINST US

No claim shall lie against us unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of the policy, nor until the amount of any insured's obligation to pay shall have been finally determined either by judgment against an insured after actual trial or by written agreement of such insured, the claimant, and us. Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under the policy to the extent of the insurance afforded by the policy. No person or organization shall have any right under the policy to join us as a party to any action against an insured to determine the insured's liability, nor shall we be impleaded by an insured or his legal representative. Bankruptcy or insolvency of any insured or any insured's estate shall not relieve us of any of our obligations hereunder. Any claim against us shall be settled by arbitration as provided in Section XIII below.

* * *

XIII. ARBITRATION

Both the insured and we acknowledge that this agreement evidences a transaction involving interstate commerce. Any dispute, claim or controversy arising out of, relating

to or in connection with the policy, its subject matter or its negotiation, as to the existence, validity, interpretation, performance, non-performance, enforcement, operation, breach of contract, breach of warranty, continuance or termination thereof or any claim alleging fraud, deceit, or suppression of any material fact or breach of fiduciary duty shall be submitted to binding arbitration in accordance with Title 9 U.S.C. § 1, et seq. (The United States Arbitration Act) and the Commercial Arbitration Rules of the American Arbitration Association. Such arbitration proceedings may be initiated by either party by notice in writing to the other and to the American Arbitration Association. Each party to arbitration shall bear its own arbitration costs and expenses. However, in the event any party is required to file a petition or commence any such other proceeding to compel arbitration, the arbitrator may award that party reasonable attorney's fees and costs incurred in having to bring such action. The arbitrator shall have the discretion to order a pre-hearing exchange of information by the parties, including, without limitation, production of requested documents, exchanging of summaries of testimony of proposed witnesses, and examination by deposition of parties. Notwithstanding contrary state law or regulation, the arbitrator shall have the authority to award any remedy or relief allowed under the provisions of the United States Arbitration Act, including, without limitation, specific performance of any obligation created under the policy, the

awarding of punitive damages, the issuance of an injunction, or the imposition of sanctions for abuse or frustration of the arbitration process. Any arbitration award shall be in writing and shall specify the factual and legal bases of the award. Judgment on the award rendered by the arbitrator shall be final and may be entered in any court having jurisdiction thereof. The provisions hereof shall be a complete defense to any suit, action, or proceeding in any federal, state or local court or before any administrative tribunal with respect to any dispute, claim or controversy arising under the policy. (Emphasis added.)

XIV. GOVERNING LAW

The policy shall be construed, and the legal relations between us and the insureds (and anyone claiming under the insureds) shall be determined, in accordance with the laws of the state in which the address of the policy-holder, as specified in the Coverage Summary is located, except that the Federal Arbitration Act (Title 9 of the United States Code) shall apply to the rights and obligations of the parties to submit any dispute, claim or controversy arising under the policy to arbitration, as provided in Section XIII above. (Emphasis added.)

15. On December 30, 1998, Deloris and Ralph Young instituted a civil action against Dr. Pizarro and other healthcare providers in the Court of Common Pleas of Belmont County, Ohio, being Case No. 98-CV-00388, alleging claims of medical professional negligence arising

during Dr. Pizarro's treatment of Deloris R. Young at the Bellaire Health Center in Bellaire, Ohio ["the underlying action"]. See Exhibit "C."

16. Pursuant to the insurance contract, Medical Assurance retained the law firm of Colombo & Stuhr to defend Dr. Pizarro in the underlying action.

17. The underlying action against Dr. Pizarro proceeded to trial on August 22, 2000 and resulted in a jury verdict being returned on August 25, 2000 against Dr. Pizarro for compensatory damages totaling $7.5 million. A motion for prejudgment interest filed by the Youngs in the underlying action was granted by the trial court and the trial court further denied various post-verdict motions filed on behalf of Dr. Pizarro. An appeal bond has been posted on behalf of Dr. Pizarro and the underlying action remains pending and unresolved.

18. On September 19, 2000, Dr. Pizarro initiated Civil Action No. 00-C-1489(G) in the Circuit Court of Ohio County, West Virginia against Medical Assurance and later Colombo & Stuhr. As to Medical Assurance, Dr. Pizarro has alleged that Medical Assurance's failure to settle the underlying action within policy limits violated a duty to deal in good faith with regard to dealings under the policy and violated provisions of the Unfair Trade Practices Act ["UTPA"]. See Exhibit "D."

19. On or about November 4, 2000, Medical Assurance filed a Motion to Dismiss Dr. Pizarro's Complaint on the basis that the Circuit Court of Ohio County lacked subject matter jurisdiction to entertain Dr. Pizarro's claims because a valid and enforceable arbitration provision exists in the insurance contract under the FAA.

20. On August 17, 2001, Judge Gaughan entered an Order denying Medical Assurance's Motion to Dismiss.[1]

PRAYER FOR RELIEF

WHEREFORE, the Petitioner, Medical Assurance of West Virginia, Inc., prays as follows:

a. That the Petition for Writ of Prohibition be accepted for filing;

b. That this Court issue a rule to show cause against the Respondents directing them to show cause, if any they can, as to why a Writ of Prohibition should not be awarded;

c. That all proceedings in the Circuit Court of Ohio County be stayed until resolution of the issues raised in this Petition;

d. Award a Writ of Prohibition against the Respondents, directing that Civil Action No. 00-C-1489(G) be dismissed from the docket of the Circuit Court of Ohio County due to lack of subject matter jurisdiction; and

e. Such other and further relief as the Court may deem proper.

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[1] The Circuit Court of Ohio County also entered an Order denying motions to dismiss of Medical Assurance based upon Dr. Pizarro's failure to properly allege that Medical Assurance engaged in a general business practice in violation of the UTPA and that Dr. Pizarro's common law bad faith claim was premature because a final, non-appealable judgment had not been entered in the underlying action.

MEDICAL ASSURANCE OF WEST VIRGINIA, INC.,

By Counsel,

/s/
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